NO. 83-898

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

EVERETT ONEIL TURBERVILLE,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

AND

RICHARD L. OWENS
ASSISTANT ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Where State law distinguishes between search warrants executable in the daytime and those executable in the nighttime, and where a "neutral and detached magistrate" finds probable cause and issues a "daytime warrant" for a certain premises, but exigent circumstances develop while the officers await sunrise, is an immediate search of the premises violative of the Fourth Amendment?

2. Where police officers have what has previously been judicially determined to be probable cause that a container contains marijuana, may the officers search that container when it is seized from a motor vehicle being driven on the public roadways?

PARTIES

In the Circuit Court of Monroe County, Alabama, the Court of Criminal Appeals and Supreme Court of Alabama the parties were: Everett Oneil Turberville, who is the Petitioner herein, and the State of Alabama, who is the Respondent herein.

The matters at issue here were first placed in issue in the Circuit (trial) Court and have been at issue throughout this litigation.

OPINIONS BELOW

All of the decisions of the lower courts were without written opinions and are therefore not reported. The Petitioner has correctly set forth in his appendix notifications from the respective court of their actions.

JURISDICTION

The Petitioner has invoked this Honorable Court's Jurisdiction under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing an alleged claim under the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

On October 15, 1981 Petitioner, Everett Oneil Turberville, was arrested by law enforcement officers and charged with violating Alabama controlled substances laws. He requested a preliminary hearing, which was held on November 10, 1981. At the conclusion of this hearing, the Petitioner was bound over to the Monroe County Grand Jury. On April 28, 1982, the said grand jury indicted the Petioner for unlawfully possessing marijuana.

The Petitioner was arraigned on said indictment on November 29, 1982. On this same day, he waived jury trial and submitted the case to the trial court for decision based upon a transcript of the preliminary hearing. The trial court found him guilty and proceeded to sentence the Petitioner to five (5) years imprisonment.

The Petitioner appealed, and on May 3, 1983, the Alabama Court of Criminal Appeals (1 Div. 537) affirmed without opinion the Petitioner's conviction. On May 31, 1983, the same court denied his application for rehearing, again without issuing a written opinion.

On August 12, 1983, the Alabama Supreme Court (82-862) granted the Petitioner's petition for writ of certiorari and remanded the cause to the Court of Criminal Appeals. However, on October 3, 1983, after the Alabama Supreme Court considered the Respondent's brief, the Court withdrew its earlier decision and quashed the writ as having been improvidently granted.

STATEMENT OF THE FACTS

At approximatley 6:00 p.m. the day before the arrest, Deputy Sheriff Steve Grifface received information from a reliable informant, who had proved in the past to supply truthful and correct information, that the Petitioner, Everett Turberville, would have a large quantity of marijuana in a large brown suitcase, and further that the Petitioner would be driving a green "Falcon" automobile and staying at the Downtown Motor Court South Motel in Monroeville, Alabama. Deputy Grifface then ascertained which room the Petitioner was in, and at 7:00 p.m. he had Larry Ikener, District Attorney's Office investigator, keep the room and car under surveillance. Between 10:00 and 11:00 p.m. Deputy Grifface obtained a valid search warrant, however according to State law it was executable only

during the daytime.

While waiting to execute the warrant after sunrise, the officers continued the surveillance all night, until just before daylight. At that time the Petitioner left the motel room and went straight to the green "Falcon"; the officers did not have time to get to him before he got in his car. The Petitioner was observed carrying a large brown suitcase which he put on the back seat. Deputy Grifface followed him down Highway 21 until it was safe to stop the vehicle.

Deputy Grifface had the Petitioner stand at the rear of the car, and then he looked on the back seat for the suitcase. Deputy Grifface opened the suitcase, at which time he could smell the marijuana even though it was still wrapped in two (2) plastic gargage bags. He then seized the container, which contained

about twenty pounds (20 lbs.) of marijuana, and then placed the Petitioner under arrest. Deputy Grifface stated that if marijuana was not found in this container, the Petitioner would not have been arrested and would have been free to leave.

ARGUMENT

THE SEARCH AND SEIZURE OF A CONTAINER FILLED WITH MARIJUANA AND BEING TRANSPORTED BY THE DEFENDANT IN HIS CAR DID NOT VIOLATE THE FOURTH AMENDMENT.

A.

A VALID SEARCH WARRANT MEETING THE REQUIREMENTS OF THE FOURTH AMENDMENT HAD BEEN OBTAINED, THOUGH IT WAS NEVER EXECUTED.

In this case, Deputy Grifface received information from a previously proven reliable informant that a crime was being committed; that the Petitioner was in possession of a large quantity of marijuana. After verifying the supplied facts, Deputy Grifface sought to obtain a search warrant only hours after talking to his informant. A valid daytime search warrant, based on probable cause, was obtained. The time of day or night

when a search warrant may be executed is governed by § 15-5-8, Code of Alabama, 1975, which states, in pertinent part, "A search warrant must be executed in the daytime unless the affidavits state positively that the property is on the person or in the place to be searched, in which case it may be executed at anytime of the day or night." Deputy Grifface did not execute this warrant because it was based on probable cause, and not actual knowledge[1]. However, in the recent case Dickerson v. State, 414 So.2d 998 (Ala.Crim.App. 1982), the Alabama

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[1]From the time of receiving the information from the informant, to obtaining the warrant, to keeping the motel room under surveillance, to stopping the Petitioner driving away and searching the car, all occurred during the night-time. The State of Alabama submits that if the search had occurred minutes later, this entire issue would vanish, for it would have been daytime, and Deputy Grifface would have conducted his search pursuant to the search warrant.

Court of Criminal Appeals held that the positive averment requirement for a nighttime search warrant can be "satisfied by the hearsay information of a confidential informant." At p. 1012. Therefore, Deputy Grifface had in his possession knowledge that would have allowed him to obtain a valid nighttime search warrant.

Nevertheless, the Fourth Amendment warrant requirement was met. Deputy Grifface took to a judicial officer the informant's information after having verified it himself. The "neutral and detached" judicial officer determined that there was probable cause to issue a search warrant. The Fourth Amendment makes no distinction between daytime and nighttime warrants, only State law does. It simply says that we are secure against unreasonable searches and seizures, and that the issuance of a warrant must be

based on probable cause. Notwithstanding our State's distinction between day and night search warrants, the warrant obtained by Deputy Grifface was undisputably issued based on probable cause. Therefore, when Deputy Grifface searched for the marijuana, there had been a search warrant issued by a neutral and detached judicial officer who determined that there was probable cause as required by the Fourth Amendment, to believe that this Defendant was in possession of a controlled substance, to-wit: marijuana, contrary to Alabama law.

Therefore, the requirements of the Fourth Amendment were met--a search warrant had been issued based upon probable cause--however, due to a mistaken belief as to State law, the police officer did not conduct the search pursuant to the valid warrant.

B.

THE PROBABLE CAUSE SEARCH WAS REASONABLE BASED ON THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT.

Notwithstanding the fact that the unexecuted search warrant had been issued based on probable cause, which was judicially determined to exist, the subsequent "warrantless" search was reasonable based on the automobile exception. This exception, first developed in Carroll v. United States, 267 U.S. 132, 69 L.Ed.2d 543, 45 S.Ct. 289 (1925), allows police officers who have probable cause to believe that an automobile contains contraband to search that vehicle without a warrant. Subsequently, in Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970), the Supreme Court stated:

> For constitutional purposes, we see no difference between on the one hand seizing and

> holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> 399 U.S. at 52, 26 L.Ed.2d 419, 90 S.Ct. 1975.

Therefore, if police officers have probable cause to search a car, they can stop it and do so without a warrant.

This exception was somewhat narrowed by United States v. Chadwick[2], 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977) and Arkansas v. Sanders[3], 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586 (1979).

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[2]A footlocker placed in the trunk of a parked car, which the officers knew for two days that it would be arriving.

[3]Officers were informed that the Defendant would fly-in later that afternoon carrying a green suitcase. The officers waited until he started leaving in a taxi at which time they stopped the taxi, opened the vehicle's trunk and seized and searched the suticase.

These cases allowed the probable cause based seizure of the vehicle and all containers therein, but required officers to obtain a search warrant before opening the container. This was based upon a greater expectation of privacy in closed, opaque containers than in the vehicle itself. The reasoning/holding of these two cases was affirmed in Robbins v. California[4], 453 U.S. 420, 69 L. Ed.2d 744, 101 S.Ct. 2841 (1981).

However, in United States v. Ross, 456 U.S. 798, 72 L.Ed.2d 572, 102 S.Ct. 2157 (1982), the Supreme Court in effect overruled Robbins, supra, and rejected some of the reasoning in Sanders, supra. The current status of Sanders is best stated by Justice Marshall in his

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[4]Officers unwrapped bricks of marijuana wrapped in opaque, plastic garbage bags found hidden in back of a stationwagon.

dissenting opinion in Ross, "Sanders is therefore effectively overruled." 72 L.Ed.2d at 604. In Ross, supra, the Court stated and held that:

> In this case, we consider the extent to which police officers--who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it--may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view. We hold that they may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant "particularly describing the place to be serached."
>
> 456 U.S. at 800, 72 L.Ed.2d at 578.

In this case, it is undisputed that the officers had probable cause to believe there was contraband in the Defendant's car, for they observed the Defendant put into the car a suitcase that they had probable cause (judicially determined even) to believe contained marijuana.

Furthermore, this Court followed its decision in Ross in United States v. Moschetta, 646 F.2d 955 (5th Cir. 1981)[5] rem'd sub nom United States v. Spieler, _ U.S. ___, 73 L.Ed.2d 1324, ___S.Ct.___ (1982), in which a warrantless search of a briefcase removed from the trunk of a car was eventually upheld based on Ross, thus reversing the suppression of the briefcase.

Just as if the officers were executing a search warrant, in conducting a warrantless search based on Ross, supra, they can only open those containers which could contain the object of the search. As the Court said in Ross, supra:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search

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[5]Now 11th Circuit.

> an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk [or on the rear seat] of a taxi contains contraband or evidence does not justify a search of the entire cab. (Emphasis added).
>
> 456 U.S. at 824, 72 L.Ed.2d at 593.

Herein Deputy Grifface stated that he was only looking for the suitcase and that the suitcase was the only container that was opened. He did not even open the clothes bag that was on top of the suitcase. His probable cause to search was limited to the suitcase and that was the only container, and area of the vehicle, that was searched. As stated further in Ross, supra:

> The scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant

> supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.
>
> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. (Emphasis added).
>
> 456 U.S. at 823-824, 72 L.Ed.2d at 593.

Therefore, Deputy Grifface restricted the scope of his search to that which would have been authorized by a warrant. His search was therefore a valid search within the confines of the automobile exception to the Fourth Amendment's warrant requirement.

CONCLUSION

In conclusion the State of Alabama, Respondent, respectfully submits that the decisions and opinions of the Alabama Courts are patently correct and entirely consistent with the decisions of this Honorable Court and that the writ is due to be denied and the Respondent prays such denial.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on Attorney for the Appellant, by placing a copy in the United States mail, postage prepaid.

Paul M. Harden
Attorney at Law
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DONE this _____ day of January, 1984.

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